Civil Resolution Tribunal

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Civil Resolution Tribunal

Indexed as: *Stadacona Dental Centre Ltd. v. The Owners, Strata Plan 1136*, 2020 BCCRT 583

B E T W E E N :

Stadacona Dental Centre Ltd.

APPLICANT

A N D :

The Owners, Strata Plan 1136

RESPONDENT

REASONS FOR DECISION

Tribunal Member: J. Garth Cambrey, Vice Chair

INTRODUCTION

1. This dispute is about a strata corporation's alleged failure to repair and maintain a perimeter drainage system and the responsibility for associated repairs, including repairs to a strata lot.

2. The applicant, Stadacona Dental Centre Ltd. (owner), owns a strata lot (SL1) in the respondent strata corporation, The Owners, Strata Plan 1136 (strata). The owner is represented by Mr. Bernard Dong, and the strata is represented by a strata council member.

3. The owner says the strata has failed to repair the below-grade perimeter drainage system located on the exterior of the building's foundation walls outside SL1 and the failed drainage has caused or contributed to flooring damage within SL1.

4. The owner seeks declarations that the strata failed to repair the building's perimeter drainage system, which it says is common property (CP), and that the strata has treated it in a significantly unfair manner.

5. The owner also seeks orders that the strata raise $150,000 by special levy to complete drainage repairs set out in a 2015 report from Read Jones Christofferson Ltd. (RJC), and an additional $35,000 by special levy to replace the flooring in SL1.

6. In addition, the owner seeks reimbursement of $6,929.35 in fees it paid Ryzuk Geotechnical (Ryzuk) and $5,049.74 in fees it paid Morrison Hershfield Ltd. (MH), for a total of $11,979.09. The owner says it is not responsible for expenses claimed by the strata, set out below.

7. The strata says the perimeter drainage has not been proven to be the cause for the SL1 floor damage and that it has not treated the owner in a significantly unfair manner. I infer the strata seeks the owner's claims be dismissed but note in its submissions, looks to the Civil Resolution Tribunal (tribunal) to determine whether the flooring damage resulted from the operation of the perimeter drainage system stating, "… the question of 'cause' remains to be decided by the [tribunal]".

8. The strata says the owner should be responsible for fees of $19,449.50 it paid to Method Engineering and Building Services Ltd. (Method) and legal fees of $27,563.53 it paid to its lawyer.

9. For the reasons that follow, I order the strata to repair the perimeter drainage system and foundation walls with assistance of a professional engineer, with the work to be funded by special levy. I order the reimbursement of ½ of the owner's claimed expenses and decline to order reimbursement of the strata's claimed expenses. I decline to order the strata to repair the SL1 flooring. I also decline to issue the declarations requested by the owner.

JURISDICTION AND PROCEDURE

10. These are the formal written reasons of the tribunal. The tribunal has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The tribunal must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the tribunal's process has ended.

11. The tribunal has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, email, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.

12. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in court. The tribunal may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

13. Under section 123 of the CRTA and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the tribunal considers appropriate.

Preliminary Decisions

14. The tribunal issued 4 preliminary decisions in this dispute which I summarize as follows.

15. On April 4, 2019, I ordered the parties to, within 15 days, exchange reports and opinions they possessed and on which they intended to rely. I also ordered the owner to provide the strata's consultant, Method, access to SL1 to inspect the strata lot within 30 days. My order included the strata ensure Method completed a report detailing its findings on the likely causes of damage to SL1 and recommendations on repairs, to stop water damage from occurring. I specifically asked the strata to have Method address recommendations about the perimeter drainage and foundation waterproofing in its report, and not to review drafts of Method's report in an effort to have Method produce an unbiased report. I ordered the strata pay for the report but that the report cost could be claimed as a dispute-related expense.

16. On August 9, 2019, after the Method report dated July 15, 2019 had been issued, another tribunal member granted the owner's request for an 8-week extension, until October 4, 2019, to provide its submissions.

17. On October 7, 2019, I issued the third preliminary decision ordering the strata to provide the owner's consultants, Ryzuk and MH, access to the perimeter drainage system and other common areas, for the purpose of investigating potential causes of water into SL1. I ordered the owner to pay for any additional reports of its consultants and to ensure any damage caused to CP as a result of the investigation was repaired at the owner's cost. My order required any reports to be disclosed to the strata and that any correspondence exchanged between the owner and either Ryzuk or MH also be disclosed to the strata. I also granted a further 5-week extension (to November 22, 2019) for the owner to provide its submissions.

18. On October 18, 2019, I amended my third preliminary decision to clarify that only correspondence exchanged between the owner and Ryzuk or MH in relation to new reports of the owner's consultants needed to be disclosed to the strata.

19. On November 22, 2019, I issued the fourth and last preliminary decision. The owner had requested an extension to March 16, 2020, to allow for its consultant, Ryzuk, to conduct testing and observe the water table of the strata property over the winter months. I found that granting the owner until December 16, 2019 to provide its submissions was a sufficient extension based on the extensions already provided to the owner and in keeping with the tribunal's mandate.

Prior Decision

20. I first issued a decision in this dispute on May 5, 2020 (prior decision), stating the applicant owner had not provided any evidence in support of his claimed dispute-related expenses. The owner raised a concern with tribunal staff by email on May 8, 2020 that his dispute-related evidence had not been considered in the prior decision.

21. Upon reviewing the matter, I found that, through inadvertence, the owner's evidence had been provided to staff, but had not been considered by me in making the prior decision. I asked for further submissions from the parties on the issue of the missed evidence and received the submissions on May 21, 2020, which I reviewed.

22. Because both parties did not have an equal opportunity to be heard, I found that it would be unfair to allow the prior decision to properly dispose of the issues between them. I made an order that the prior decision was a nullity (meaning 'of no effect').

23. I issued reasons to the parties by email on May 26, 2020, explaining that the prior decision was a nullity because, through tribunal inadvertence, some of the owner's evidence was not reviewed before to the decision was made and issued.

24. In reaching my conclusion, I relied on section 51(3) of the CRTA that permits the tribunal to reopen a dispute, on the request of a party, to cure a jurisdictional defect. I also relied upon the decision in *Chandler v. Assn. of Architects (Alberta),* [1989] 2 SCR 848, where the Supreme Court of Canada held that a tribunal may reopen a dispute to discharge the function committed to it, if the tribunal has failed to dispose of an issue fairly before it, and where the legislation indicates that the dispute may be reopened. *Chandler* also says that where there is a denial of natural justice that makes the proceeding ineffective, the tribunal must start afresh. The court's finding in *Chandler* is also consistent with the reasoning of the courts in *St. George's Lawn Tennis Club v. Halifax (Regional Municipality),* 2007 NSSC 26, and *Fraser Health Authority v. British Columbia (Workers' Compensation Appeal Tribunal),* 2014 BCCA 499, appeal upheld on other issues at 2016 SCC 25.

25. This is the fresh final decision about this dispute, which I have made after reviewing the evidence and further submissions from both the owner and strata.

26. Given the additional evidence and submissions relates only to dispute-related expenses, I only reopened that portion of this dispute.

ISSUES

27. The issues in this dispute are:

    a. Do the strata building's perimeter drainage system and foundation wall require repair and, if so, to what extent?

    b. Has the perimeter drainage system and foundation wall caused damage to the SL1 flooring?

    c. If yes, was the strata negligent in not repairing the drainage system and foundation wall?

    d. Has the strata treated the owner in a significantly unfair manner by not replacing the damaged SL1 flooring?

e. What remedies are appropriate, if any?

BACKGROUND, EVIDENCE AND ANALYSIS

28. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.

29. In a civil proceeding such as this, the applicant owner must prove its claims on a balance of probabilities.

30. The strata was created April 5, 1982 and is located in Victoria, BC. It consists of 29 strata lots in a single 4-storey building. The strata plan shows SL1 is located on the ground level in the southwest corner of the building next to a CP underground parking area. SL1 is a single-level strata lot that extends past the building footprint. There are residential strata lots and a roof immediately above it.

31. On March 31, 2004, the strata filed a full revised set of bylaws at the Land Title Office (LTO), incorporating amendments made at a general meeting held in February 2004. Prior bylaw amendments were not provided in evidence. Given neither party objected, I accept the March 31, 2004 filed bylaws accurately reflect all amendments made to that date. I find these are the applicable bylaws to this dispute. Subsequent bylaw amendments were filed at the LTO, but I find none are relevant. I discuss the strata's relevant bylaws as necessary below.

32. Bylaw 3(1)(e) states that SL1 and strata lot 29 are commercial strata lots and that all other strata lots are residential. There are no bylaws that establish separate sections or different types of strata lots as permitted under Part 11 of the *Strata Property Act* (SPA) or sections 6.4(3) and 17.13 of the Strata Property Regulation (regulation) respectively.

33. There is a long history of moisture issues in SL1. I find that some of the history is necessary to give context to the dispute, and provide the following background.

34. According to LTO records, the owner purchased SL1 in July 2007. The parties agree the owner renovated SL1 around the same time to accommodate the

existing dental office. Part of the renovations included cutting through SL1's concrete floor slab to install plumbing lines below the slab and then repairing the "trenches" with concrete.

35. In about 2008, the owner allegedly notified the strata that the flooring in SL1 was damaged from moisture. Strata council meeting minutes of June 10, 2008 support the allegation but do not specifically mention moisture damage. The owner says it retained a contractor, Larry Willett (Willett) to investigate the issue. In a sworn statement, Willett confirms he was hired by the owner to provide an opinion on the flooring "failure" and determined the perimeter drainage pipes were located "too high to prevent water from getting under the slab and that caused or contributed to the premature failure of [the SL1 flooring]".

36. The owner says it replaced the SL1 flooring because the strata refused to do so, which the strata does not dispute. The owner submits it replaced the SL1 flooring in December 2011. Based on an invoice from Hourigan's Carpets & Linos Ltd. dated December 21, 2011 and the overall evidence and submissions, I find the SL1 flooring was only partially replaced in 2011.

37. In October 2014, the owner again complained to the strata of moisture damage to the new flooring in SL1. The strata retained Brent Jansen Plumbing and Heating (Jansen) to investigate concerns that the perimeter drainage pipes had not been maintained. The parties agree that Jansen repaired some sections of the perimeter drainage pipes and connected the building's perimeter drainage pipes to the City of Victoria's (City) drainage system. The extent of the work is not in evidence. The date the work was completed is unclear but based on the overall evidence, I find it was completed in 2014, before the involvement of RJC explained below. This is supported by a sworn statement of a long-time resident of the building provided by the strata.

38. In March 2015, the strata agreed to retain RJC, an engineering firm, to "examine and report on the condition of the perimeter drains". RJC provided a report dated May 20, 2015. The reports states that RJC made 2 exploratory excavations on the

exterior foundation wall to expose the perimeter drainage system. At one location no waterproof detailing was observed on the foundation wall and the perimeter drain pipe was found to be “above the top of the foundation”. It was also observed that moisture ingress below the SL1 floor slab could occur at the “cold joint” between the foundation wall and its concrete base. “Damp proofing” was observed on the foundation wall at the other location but flood testing of the excavated areas did not generate any significant increase in moisture inside SL1.

39. RJC concluded the moisture ingress affecting the flooring in SL1 was ”most likely due to a high ground water table at the property driving moisture up through the concrete slab-on-grade” in SL1 and the “inaccurately positioned perimeter drain”. RJC recommended lowering the perimeter drain to manage the high ground water table, waterproofing the foundation wall, and improving the drainage layers around the perimeter drain at an estimated cost of $37,800, including consultant fees and taxes. RJC did not complete any exploratory investigations of the SL1 floor slab.

40. An informal meeting was held with 13 owners, representatives of RJC, and Jansen on July 21, 2015. Minutes of the informal meeting show the owner was represented at the meeting. The minutes also show that various questions were put to RJC and to Jansen about the interior floor conditions, which confirmed only a visual inspection of the flooring was completed. Additional questions were put to RJC about its report by the strata council in August and October 2015 via email. The reply emails from RJC show that it did not change its opinion or recommendations set out in its March 2015 report, despite challenges made by the strata council and certain owners. RJC also noted the scope of work for its report did not include providing an opinion on the flooring in SL1.

41. I find the evidence shows the strata did not fully accept RJC’s findings and recommendations because it believed that testing should be completed on the condition of the SL1 floor slab, especially at the locations where the 2007 plumbing alterations had occurred. In its submissions, the strata says a number of owners believed the testing completed by RJC was “poorly conducted” and that the RJC report “conflicted with the projected life expectancy [of the perimeter drains]

documented in an earlier depreciation report. I note a single page from a 2013 depreciation report was provided in evidence that states the perimeter drainage had a 40-year serviceable life. This suggests that in 2015, the estimated life remaining for the perimeter drains was 7 years. However, I find the estimated remaining life of the perimeter drains in the depreciation report is merely a guide that should not be relied upon as fact.

42. The parties agree that the strata requested the owner conduct further testing at its cost which the owner refused to do. Hence, the parties remained at an impasse.

43. In November 2015, the strata retained Dahorn Consultants Ltd. (Dahorn) to investigate the exterior roof and interior ceiling leaks of SL1. This seems to have come about from the owner's request to investigate a "moldy ceiling tile" in September 2015. A 2-page letter report authored by David Hornsey, a professional engineer, dated January 4, 2016 was provided to the strata. The report identified 8 locations within SL1 where water damaged ceiling tiles had been replaced plus 1 wall area were water damage was being repaired at the time of the report. The report states all identified water ingress locations were "minor and correctable".

44. The report also states that of the 8 locations investigated, 3 areas were related to exterior roof or balcony areas and related "deficiencies" were corrected in December 2015. Dahorn suspected 2 additional exterior locations related to wind-driven rain and recommended these 2 areas be caulked if the leaks persisted. The remaining 3 locations were interior to SL1, which Dahorn attributed to condensation from plumbing pipes located in the ceiling space above the ceiling tiles. Dahorn recommended that insulation be wrapped around the pipes "where necessary". It is unclear if the ceiling pipe insulation work was completed.

45. Dahorn also offered its opinion on the cause of the floor deterioration in SL1, stating the damage was caused by high relative humidity based on readings it had taken December 11, 2015. The owner disputed the high relative humidity readings as the cause for the SL1 floor issues. The evidence shows the strata was provided with relative humidity readings taken by the owner's representative at several

times over a few weeks following the report that were significantly lower than the readings taken by Dahorn. Email evidence dated January 2016 shows the strata questioned the owner's expertise and ability to take accurate relative humidity readings. Other emails show that 2 council members were angry with Dahorn's report, suggesting it should be "thrown out" and the RJC recommendations should be followed. The parties remained at an impasse.

46. The strata held its annual general meeting (AGM) on February 25, 2016. A ¾ vote resolution to spend $5,000 from the strata's contingency reserve fund (CRF) for another report from RDH Engineering Ltd. was unanimously defeated by all 29 represented votes, including the owner who was shown to be present by proxy. The minutes reflect that after heavy rainfall for the previous 2 months no further leaks into SL1 had been reported and that "the situation would be monitored".

47. In July 2016, the owner retained Unisol Engineering Ltd. (Unisol) to review the findings of Willett and RJC. A July 10, 2016 email from the owner to Unisol states the owner believed the strata felt the flooring issue was the owner's responsibility despite the findings of Willett and RJC, and another plumbing contractor. A 3-page response from an unknown individual at Unisol dated September 2, 2016 answers a number of questions posed in the owner's email and provides comments on a marked-up page of the RJC report and a drainage drawing detail provided by Willett. If is unclear from the email response what comments were provided by the Unisol representative as the answers were included in the content, and not well-defined from, the original email the sent by the owner. However, I find the response provided shows Unisol essentially agreed with RJC and Willett that the foundation waterproofing and perimeter drainage system were likely inadequate, and that the location of the perimeter drains could potentially allow water through a cold joint and under the floor slab in SL1. Unisol also correctly commented that the source of moisture causing the increased relative humidity was not identified by Dahorn.

48. At the February 23, 2017 AGM, the strata presented a ¾ vote resolution to spend $50,000 from the CRF to have Jansen and another contractor repair the perimeter

drains based on the RJC report. The resolution was defeated with 13 votes in favour and 16 votes opposed.

49. A January 22, 2018 email from the strata's lawyer to the owner's lawyer states:

> Our client has asked me to let you know that the strata council is in agreement that the foundation/perimeter is a repair that the strata corporation needs to proceed with. We are anticipating needing to persuade at least some in the 'resistance' camp so that a ¾ vote to fund the repairs is successful (I understand two such efforts have not been successful to date). So, we are now strategizing this effort. Our client was concerned to let yours know that the council [is] on board with the required repairs.

50. An "information bulletin" dated February 7, 2018 prepared by the strata's lawyer, was distributed to all strata owners. The letter set out the lawyer's recommendation to proceed with the perimeter drain repairs as being in the best interest of the strata, citing reasons of developed case law involving CP repairs, current evidence, and cost-benefit and risk exposure analyses of the available repair approaches.

51. The January 23, 2018 strata council meeting minutes also confirm the strata's "Depreciation Report Committee" recommended the strata repair the foundation walls and perimeter drains on the south and west sides of the building, including damp proofing the foundation walls and sealing the cold joints. The recommendation also included the use of an engineering firm for design drawings and specifications associated with the work.

52. At a special general meeting (SGM) held June 27, 2018, the strata ownership defeated a proposed ¾ vote resolution to approve a $10,500 expense from the CRF to retain Herold Engineering (Herold) to provide services quoted February 15, 2018. The quoted services were not provided in evidence but based on the parties' submissions, I infer they related to work recommended by the committee in the January 23, 2018 strata council meeting minutes. The minutes show the resolution was defeated by a vote of 22 in favour and 9 opposed, or 70.97% in favour, falling

2 votes short of the required 75% in favour. It is unclear why the resolution failed to pass considering the advice given by the strata lawyer.

53. The Dispute Notice for this dispute was issued September 11, 2018.

54. On April 4, 2019, I issued the first preliminary decision noted above requiring the owner to allow Method access to SL1 for the purpose of providing a report on the likely causes of damage to SL1 and recommendations on repairs to stop water damage from occurring.

55. Matt Mulleray, a professional engineer with Method, authored a report dated July 15, 2019 (Method report). Part of my April 4, 2019 preliminary order was that the strata instruct Method to investigate SL1 and the strata's CP, provide recommendations on repairs necessary to stop any likely cause of water damage in SL1, including specific repairs necessary to the perimeter drainage and foundation waterproofing, and if other CP repairs were recommended.

56. The evidence shows that Method was provided with the RJC report, the July 21, 2015 information meeting minutes with RJC and several owners, the Dahorn report, various emails, and other information provided by the strata. The report states that Method reviewed the building envelope, including the exterior walls and glazing, perimeter drainage, and SL1 floor slab. Method retained BC Floor Covering Association to evaluate the SL1 flooring, including its installation, product choice, substrate preparation, and maintenance. BC Floor Covering Association provided a detailed report dated June 20, 2019 about the installed flooring (flooring report) that was appended to the Method report.

57. The flooring report confirmed the presence of moisture in SL1 could cause damage to the flooring. The report also included relative humidity readings that were taken at 7 locations within SL1 stating the readings were all within an acceptable range established by the flooring manufacturer.

58. Method interpreted the flooring report to mean that the existing SL1 floor was the wrong material because of moisture content in the slab, incorrect installation in

part (no allowance for expansion and contraction), and alleged poor maintenance practices.

59. As I discuss below, I find Method's conclusions about the perimeter drainage and foundation wall waterproofing essentially agree with those of RJC, MH, Ryzuk, and other contractors and consultants retained by the owner, such as Willett and Unisol.

60. Method's examination of the SL1 floor slab included removing a portion of the floor slab at a location near where the slab had previously been removed to allow for the plumbing alterations in 2007 (trenched area). The exploratory opening was first made in the SL1 floor slab next to an altered area and revealed a vapour barrier located beneath the slab. The opening was then extended to remove concrete that filled a trenched area that revealed no vapour barrier. Method concluded that the vapour barrier was not reinstalled when the plumbing alterations were completed in 2007.

61. Method recommended sealing of exterior concrete block walls and windows located on the southeast and southwest of SL1 and lowering the grade levels around the exterior building wall at the same locations. Method made no recommendation about the missing vapour barrier as a result of the SL1 alterations.

62. As earlier noted, the owner was provided 3 extensions to provide its submissions, in part to allow its consultants, Ryzuk and MH, to complete reports in response to the Method report. As stated in the MH report dated December 13, 2019, MH and Ryzuk worked together to provide a scope of work for addressing the perimeter drainage and foundation wall repairs. The MH report outlines the investigative work it completed with Ryzuk on the building exterior that included excavating 3 areas to expose the perimeter drainage system and foundation wall. The report also confirms that MH was provided with the RJC and Method reports. I find MH recommendations agree with the recommendations of Method, except with respect

to comments about the vapour barrier below the SL1 floor slab, that I discuss below.

63. A December 16, 2019 report from Ryzuk to the owner's representative states Ryzuk was retained to investigate the "drainage conditions at the site". I infer it was Ryzuk that completed the 3 excavations referenced in the MH report because some of the photographs are the same. The Ryzuk report also confirms its was provided with the RJC and Method reports. I also find Ryzuk's recommendations agree with those of Method and MH about the perimeter drain repairs, except that it also recommended the lowered drains be surrounded with crushed rock and a filter cloth to improve drainage to meet current Building Code requirements. Ryzuk (and MH) also observed a roof drain pipe that drains directly into the perimeter drainage system. Ryzuk recommended it be separated from perimeter drainage system and separately drained to the municipal stormwater drain via an independent solid drainpipe. Ryzuk also disagreed with comments Method made about the vapour barrier below the SL1 floor slab as I discuss below.

64. In the strata's response submission, the strata reproduced what it alleges was a response from Method on the MH and Ryzuk reports. The referenced Method response letter was not produced in evidence and I find nothing turns on the alleged statements, given my conclusion below that the reports essentially agree on the recommended repairs for the perimeter drainage system and foundation wall repairs.

Do the strata building's perimeter drainage system and foundation wall require repair and, if so, to what extent?

65. I will first address the alterations that took place in SL1 in 2007 as described above.

66. Although the strata says the owner did not have strata approval to complete the renovations, there is no evidence to suggest approval was not given nor is there evidence of an alteration or indemnity agreement where the owner takes responsibility or assumes liability for the alterations. There is also no evidence that

shows the strata requested the owner restore SL1 (or CP) to the condition it was in before the alterations. In other words, the strata knew about the alterations and did not object to them. My conclusion is supported by a sworn statement of a resident owner and retired engineer provided by the strata, who was on the strata council at the time the SL1 alterations took place. The past council member described seeing "trenches" in the SL1 concrete slab and that the strata council had no knowledge of the extent of the renovation. For these reasons, I find the strata approved the alterations by not objecting to them and taking no action since they were completed in about 2007, a period of 13 years.

67. As I have mentioned, SL1 is on the ground floor of the building. Section 68 of the SPA addresses strata lot boundaries. Unless otherwise stated on the strata plan, the boundary of strata lot is midway between the structural portion of a wall, floor or ceiling of a strata lot that forms a boundary with another strata lot or CP. Here the strata plan does not show a different boundary. This means that for the concrete floor slab of SL1, the strata lot boundary is the midpoint of the slab. Therefore, the part of the slab that is below the slab's mid-point is CP. Given the plumbing lines that formed part of the earlier alterations were installed below the concrete slab, I find the plumbing lines are CP. Further, any land below the slab is also CP.

68. The acceptance of the CP alterations without an alteration or indemnity agreement in this case means the pipes installed below the concrete floor slab of SL1, and any lack of vapour barrier below the slab, are the responsibility of the strata to repair and maintain under section 72 of the SPA. For these reasons, I do not accept the strata's argument that the owner is responsible for any pipe leaks that may occur below the floor slab.

69. For the following reasons, I find the perimeter drainage system and foundation wall require repair.

70. I have considered the reports provided by RJC, Method, and MH/Ryzuk. Although submitted separately, I consider the MH/Ryzuk reports to be a single report given

the authors were working together using the same data. I do not find that any of the provided opinions qualify as expert opinions under tribunal rule 8.3 for the following reasons. For RJC, MH and Ryzuk, the authors did not include their qualifications so I cannot determine if their respective education, training or experience rises to the level of an expert. For Method, I find there is a perception of the author acting as an advocate for the strata contrary to the tribunal's rules. This perception is confirmed by the owner's submissions, comments contained in MH and Ryzuk reports, and my interpretation of the Method report about necessary repairs to the perimeter drainage system to reduce or stop moisture from migrating through the slab as I discuss below. Although I find the opinions are not expert opinions, I find they are professional opinions from individuals in the building science and engineering industry. I rely on the 3 professional reports equally and give them equal weight.

71. All 3 assessments exposed and examined the perimeter drainage and foundation walls at easily accessible locations. All reports agree that the bottom of some portions of the perimeter drain pipe are not located below the SL1 floor slab.

72. All reports have also identified that the foundation wall in at least one location is not capable of keeping water from migrating to through the foundation wall because damp proofing is not present or has been damaged. Although MH noted the SL1 roof drain pipe was connected to the perimeter drainage system, only Ryzuk recommended it be run separately to the municipal connection. I interpret the reasons to be because it is a current Building Code requirement and also to avoid debris from the roof being washed down the drain and blocking the perimeter drainage system.

73. The reports all address the ability of water to permeate the SL1 floor slab and the lack of a vapour barrier below the slab where it was "trenched" in 2007. The reports differ on the practical function of the original plastic vapour barrier, given its age and likely condition, and the likelihood of hydrostatic pressure building to a sufficient level below the slab to force water up through the slab causing damage to the floor. Except for Method, the reports state there is a potentially high-water

table, such that the current drainage system may not allow water that might buildup under the slab to drain away quickly enough during wetter months. This could allow water to migrate through the slab and damage the flooring.

74. I find the recommendations set out in the Method report about the perimeter drainage and foundation wall repairs could have been clearer. Specifically, on page 11 of its report, Method stated the perimeter drainage system is adequately removing water from the base of the foundation and ***not*** allowing for the buildup of water above the floor slab. However, on the same page, Method confirmed that moisture was found on top of the SL1 floor slab. Method's conclusion is that the moisture on top of the SL1 floor slab occurred because the vapour barrier was not reinstated under the floor slab where it was trenched. There is no misinterpreting this conclusion, which I find, put simply, says that water does migrate through slab.

75. However, Method does not provide recommendations about how to stop the moisture migrating through the slab. It only offers that if the moisture content of the [SL1 floor slab] cannot be addressed from the interior of SL1, modifications to the perimeter drainage system and foundation walls at the southwest corner of the building may be necessary. The suggested modifications were the same as reported by the other consultants, except for the separation of the SL1 roof drain pipe.

76. Based on the overall evidence of the 3 professional reports, I find it is more likely than not that the perimeter drainage system and foundation walls require repair to allow for appropriate water drainage from under the SL1 floor slab.

77. Based on the recommend repairs set out in the 3 professional reports I find there is agreement on the following repairs, which I find must be completed:

    a. replace the perimeter drain along the southern frontage of SL1 with new piping so that the bottom of the new piping is a minimum of 300 mm below the interior floor of SL1,

b. install of a minimum 150 mm thick layer of clear crushed rock surrounding the perimeter drain that is encompassed by medium weight, non-woven geotextile,

c. reapply damp proofing to the concrete foundation wall that is exposed for the perimeter drain repair, and

d. replace the existing foundation wall backfill with a free-draining select granular fill containing minimal fines and no organics and rubble.

78. I also find that the SL1 roof drain must be disconnected from the perimeter drain system and connected to a municipal stormwater drain via a solid pipe independent of the perimeter drain pipe as recommended by MH/Ryzuk.

Has the perimeter drainage system and foundation wall caused damage to the SL1 flooring?

79. Based on my conclusion above, I find the perimeter drainage system and foundation wall have more likely than not contributed to the damage to the SL1 flooring. But I do not find they are the sole cause.

80. There are other possible causes of flooring damage identified in the flooring report. Those include excessive washing and not properly allowing for expansion and contraction of the flooring by failing to install moulding for flooring in excess of 10-foot lengths. Also, I accept the conclusion that one area of flooring damage was caused by overwatering a potted plant.

81. Finally, I have noted that the SL1 flooring was not entirely replaced in 2011. Therefore, I find it is reasonable for me to conclude that the flooring was not entirely damaged in 2011.

82. For these reasons, I find the perimeter drainage system and foundation walls have partially contributed to damaging some areas of the SL1 flooring. However, I also find the owner has not proved the perimeter drainage system and foundation wall are the sole cause of the SL1 flooring damage. Based on professional reports in

evidence, I find that that some flooring damage could have also been caused by things within the control of the owner, such as maintenance and installation.

83. I find the flooring report and the Dahorn report reach different conclusions about relative humidity being the cause of the flooring damage. I find the evidence before me about relative humidity to be inconclusive and I make no finding about whether relative humidity within SL1 was a factor that caused damage to the flooring.

Was the strata negligent in not repairing the drainage system and foundation wall?

84. To prove negligence the owner must show that the strata owed it a duty of care, the strata breached the standard of care, the applicant sustained damage, and the damage was caused by the strata's breach (See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at par 33).

85. The parties agree, and I find, that the perimeter drainage system and foundation wall are CP. Under section 72 of the SPA, the strata is responsible to repair CP and does not have the ability to transfer that responsibility to the owner.

86. Bylaw 8 also requires the strata to repair and maintain CP. It also makes the strata responsible for repairs to the exterior of a building and strata lot.

87. There is no question the strata owed the owner a duty of care to repair the CP drainage and foundation walls.

88. As noted in *Weir v. Strata Plan NW 17, 2010 BCSC 784*, the standard of care required by the strata is one of reasonableness.

89. What is reasonable in the circumstances also depends on the likelihood of the need to repair, the cost of further investigation, and the gravity of the harm sought to be avoided or mitigated by investigating and remedying any discovered problems (*Guenther v. Owners, Strata Plan KAS431,* 2011 BCSC 119 at paragraph 40).

90. Based on the court's findings in *Guenther*, I find that part of the strata's duty to repair includes a duty to investigate the need for repair. Like the duty to repair, the duty to investigate is similarly limited to what is reasonable in the circumstances.

91. As noted above, in June 2018, the ownership defeated a resolution to retain Herold to prepare design drawings and specifications for the perimeter drainage and foundation wall repairs. While it is concerning the strata did not follow its lawyer's advice to proceed with these repairs at that time, I do not find it was unreasonable for the strata to want to complete further investigations into the cause of the flooring damage. Between 2014 and 2018, after the owner advised the strata of a second failure of its flooring, the strata took steps to partially repair the perimeter drainage system and further investigate the cause of the flooring damage. The parties co-operated with each other up until April 2019 when the tribunal became involved to order requested investigation. The cause of the damage was not fully determined in 2018 and, indeed, is not fully determined now as I have stated in these reasons. It has taken 2 additional professional reports (Method and MH/Ryzuk) for me to conclude that the perimeter drainage system and foundation wall do need to be repaired.

92. For these reasons, I find the strata acted reasonably when it decided not to repair the perimeter drainage system and foundation wall and continue its investigation. On that basis, I dismiss the owner's claim for negligence.

Has the strata treated the owner in a significantly unfair manner by not replacing the damaged SL1 flooring?

93. I find the answer to the question is no.

94. The tribunal has jurisdiction to determine claims of significant unfairness because the language in section 164 of the SPA is similar to the language of section 123(2) of the CRTA (formerly section 48.1(2)). This gives the tribunal authority to issue such orders. (See *The Owners, Strata Plan LMS 1721 v. Watson*, 2018 BCSC 164 at paragraph 119.)

95. The courts and the tribunal have considered the meaning of "significantly unfair" in a number of contexts, equating it to oppressive or unfairly prejudicial conduct. In *Reid v. Strata Plan LMS 2503,* 2003 BCCA 128, the British Columbia Court of Appeal (BCCA) interpreted a significantly unfair action as one that is more than "mere prejudice" or "trifling unfairness" and must be burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

96. The BCCA has also considered the language of section 164 of the SPA in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44. The test established in *Dollan* was restated in *The Owners, Strata Plan BCS 1721 v. Watson*, 2017 BCSC 763 at paragraph 28:

> [28] The test under s. 164 of the *Strata Property Act* also involves objective assessment. [*Dollan*] requires several questions to be answered in that regard:
>
> a. What is or was the expectation of the affected owner or tenant?
>
> b. Was that expectation on the part of the owner or tenant objectively reasonable?
>
> c. If so, was that expectation violated by an action that was significantly unfair?

97. In *Radcliffe v. The Owners, Strata Plan KAS1436*, 2015 BCCA 448, the BCCA found that that the test set out in *Dollan,* about whether the disputed action was significantly unfair based on the owner's expectations may not apply and that only a determination of significant unfairness such as defined in *Reid*, is necessary.

98. Under either test, I find the applicant's claim for significant unfairness cannot succeed.

99. Applying the test in *Dollan* to the facts before me, I find the owner's expectation was that the strata should replace the flooring in SL1.

100. I find the owner's expectation that the strata would replace the SL1 flooring was objectively unreasonable. It has taken several qualified professional investigations to determine the perimeter drainage system and foundation walls have more than likely contributed to partial damage to the flooring. Further, the owner has not proven that at least some of the flooring damage has been caused by its maintenance of the floor or how the floor was installed.

101. In any event, I do not find the actions of the strata have met the definition of significant unfairness set out in *Reid*, as being burdensome, harsh, wrongful, lacking in probity or fair dealing, done in bad faith and/or unjust or inequitable.

102. I dismiss this aspect of the owner's claim.

What remedies are appropriate?

103. I find that the funds required to complete the ordered work must be raised by special levy in order for the strata to perform its duty to maintain and repair CP. I order the strata to impose a special levy or levies as set out below without the need for a ¾ vote. I find my authority to make such an order comes from section 123 of the CRTA, which, as noted above, states the tribunal may make orders requiring the strata to do something and to pay money, in order to address a strata property claim.

104. I decline to issue a declaration the strata has failed to repair and maintain the perimeter drains and foundation wall as requested by the owner. I say this because it was only as a result of this dispute, that the drains and wall have been found to be in need of repair.

105. As for the perimeter drainage system and foundation wall repairs, I have found they are the strata's responsibility to repair and require repair. Therefore, I order the strata to repair them.

106. However, I decline to make the specific order for a $150,000 special levy as requested by the owner as there are no estimated repair costs before me. Rather, I find the strata must first retain an engineer to complete design drawings and

specifications that include the scope of work about the extent of the repair required I set out above, tender the repair work to qualified contractors with the assistance of the engineer, and proceed with the repair work by raising the required amount by special levy. I set out my order in more detail below. I have ordered the strata retain Herold, or another engineering firm agreeable to both parties, because of perceptions of bias toward the engineering firms involved to date as expressed in the parties' submissions.

107. I do not order the strata to seal the exterior windows or building walls as recommended by Method because the owner limited its requested remedies only to the perimeter drainage system and foundation wall repairs. However, nothing in this decision restricts the strata from expanding the scope of work to include other CP repairs with the assistance of the engineering firm that is retained for the ordered work.

108. I urge the strata to take the necessary steps to repair all known CP that has been identified by Method as being a cause for damage within SL1. It is open to the owner to file another dispute about additional CP repairs.

109. Given my conclusion on negligence and significant unfairness above, I also decline to order the strata raise a special levy to repair the SL1 flooring or issue a declaration that that strata has acted significantly unfairly about the flooring repairs.

TRIBUNAL FEES AND EXPENSES

110. Under section 49 of the CRTA, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. Given the owner was partially successful, I order the strata to reimburse it ½ of the tribunal fees the owner paid, or $112.50.

111. Both parties made submissions on dispute-related expenses as noted above.

112. I will first address the respondent strata's claim for legal fees. The tribunal's rules state that the tribunal will not order one party to reimburse another party's legal fees in strata property disputes, except in extraordinary circumstances. The owner also cites *The Owners, Strata Plan VR293 v. Bains*, 2019 BCCRT 504, where the tribunal found that legal fees could be awarded if a strata corporation had specific bylaws to allow it to charge legal fees to an owner. I agree with the owner that this case is not extraordinary and that the strata does not have permission in its bylaws to charge the owner legal fees. I do not agree with the strata that legal advice was necessary for Method to produce a neutral report. For these reasons, I dismiss the strata's claim for legal fees.

113. Turning to the strata's claim for reimbursement of Method's fees totalling $19,449.50, I find the Method report was necessary and helpful in this dispute and I relied on it in finding for owner on the aspect of perimeter drainage and wall repairs. Given, my finding that the report supported the owner's position the repairs were needed, I dismiss the strata's claim that the owner pay Method's fees. However, I do find that the owner must pay its proportionate share of the Method fees, if it has not done so already. Therefore, I order that the Method fees of $19,449.50 incurred by the strata for this dispute are a common expense of the strata.

114. I now turn to the owner's claim for fees it paid to Ryzuk of $6,929.35 and to MH of $5,049.74, for a total of $11,979.07. The Ryzuk fees are supported by 4 invoices dated between October 4 and December 31, 2019. The MH fees are supported by 4 invoices dated between October 7, 2019 and January 10, 2020. Given the expenses were incurred during this dispute, I find they are dispute-related expenses. I also find the reports were necessary to this dispute and I relied on them in making this decision.

115. In its further submissions, the owner says it is entitled to a full reimbursement of its claimed dispute-related expenses. The position of the strata is that the owner's expenses should be discounted by ½ or more because he was only partially

successful in this dispute. The strata also says a discount is required because of my finding that the perimeter drainage only contributed to SL1's floor damage.

116. My interpretation of tribunal rule 9.5 is that reimbursement of dispute-related fees is tied to a party's success. The rule is also clear that the tribunal has discretion to order reasonable dispute-related expenses be paid to the successful party. I have found the owner is the most successful party, therefore, I find it is entitled to reasonable dispute-related expenses. The question remains: What amount of expenses is reasonable in the circumstances?

117. I find the owner was seeking the strata pay for perimeter drainage repairs and for flooring replacement in SL1. The owner was successful in having the strata pay for the drainage repair but not the flooring. I find the owner's claim for significant unfairness was, in essence, an alternate claim to his negligence claim for SL1 flooring repairs. For these reasons, I find the strata must reimburse the owner ½ of its claimed dispute-related expenses, or a total of $5,898.54, and I so order. The owner is exempted from paying its proportionate share of these ordered expenses.

118. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses, other than the expenses of Method, against the owner.

ORDERS

119. The strata's claim for dispute-related expenses is dismissed except that I order that Method's fees of $19,449.50 paid by the strata is a common expense and the owner is not exempted from paying its proportionate share of the fees.

120. Within 30 days of the date of this decision, I order the strata to:

    a. Pay the owner a total of $6,011.04 broken down as follows:

        i. $112.50 for tribunal fees, and

        ii. $5,898.54 for dispute-related fees.

    The owner is exempted from paying its proportionate share of the $6,011.04.

b. Retain Herold, unless another engineering firm is agreed to by the owner, to complete design drawings, specifications, and tender documents to address water ingress into SL1 that include, but are not limited to, the following scope of work:

i. replace the perimeter drain along the southern frontage of SL1 with new piping so that the bottom of the new piping is a minimum of 300 mm below the interior floor of SL1,

ii. install of a minimum 150 mm thick layer of clear crushed rock surrounding the perimeter drain that is encompassed by medium weight, non-woven geotextile,

iii. disconnect the SL1 roof drain from the perimeter drain and connect the SL1 roof drain to a municipal stormwater drain via a solid pipe independent of the perimeter drain pipe,

iv. reapply damp proofing to the concrete foundation wall that is exposed for the perimeter drain repair,

v. replace the existing foundation wall backfill with a free draining select granular fill containing minimal fines and no organics and rubble.

121. Within 180[1] days of the date of this decision, or by November 23, 2020[1], I order the strata to tender the final design drawings and specifications to as many qualified contractors as determined by Herold (or the alternate engineering firm agreed to by the parties).

122. Within 210[1] days of the date of this decision, or by December 23, 2020[1], I order the strata to:

a. Retain Herold (or the alternate engineering firm agreed to by the parties) to:

i. oversee the tendered work,

ii. recommend a contractor to complete the tendered work, and

b. retain the recommended contractor to complete the tendered work.

123. I order the strata to raise the funds necessary to retain:

a. Herold (or the alternate engineering firm agreed to by the parties), and

b. the recommended contractor,

by special levy or levies without the need to call a general meeting to approve a ¾ vote. A special levy will be calculated based on unit entitlement and payable within 30 days of the date the strata requests payment. Other than the ¾ vote requirement, all other provisions about special levies under sections 108 and 109 of the SPA will apply to these special levies.

124. The owner is entitled to post-judgement interest under the *Court Order Interest Act*, as applicable.

125. Under section 57 of the CRTA, a party can enforce this final tribunal decision by filing a validated copy of the attached order in the Supreme Court of British Columbia (BCSC). Once filed, a tribunal order has the same force and effect as a BCSC order.

126. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia (BCPC). However, the principal amount or the value of the personal property must be within the BCPC's monetary limit for claims under the *Small Claims Act* (currently $35,000). Under section 58 of the CRTA, a party can enforce this final decision by filing a validated copy of the attached order in the BCPC. Once filed, a tribunal order has the same force and effect as a BCPC order.

J. Garth Cambrey, Vice Chair

[1] Paragraphs 121 and 122 of the order have been varied pursuant to a post-adjudication decision dated July 16, 2020 indexed as *Stadacona Dental Centre Ltd. v. The Owners, Strata Plan 1139*, 2020 BCCRT 799. The order was varied under the authority granted by section 48(4) of the *Civil Resolution Tribunal Act.*